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No. 89-449

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

UNITED SERVICES AUTOMOBILE ASSOCIATION, et al.,

Petitioners

v.

CONSTANCE FOSTER, et al.,

Respondents

RESPONDENT FOSTER'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state statute which prohibits affiliations between banks and insurance companies, and which treats in-state and out-of-state entities identically, violates the Commerce Clause?

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STATEMENT OF THE CASE

1. This is a constitutional challenge to a Pennsylvania statute prohibiting affiliations between banks and insurance companies. Section 641 of Pennsylvania's Insurance Department Act provides that "[n]o lending institution,...bank holding company, savings and loan holding company or any subsidiary or affiliate of the foregoing...may, directly or indirectly, be licensed...as an insurer or be licensed to sell insurance in this state...." Pa. Stat. Ann., tit. 40, § 281(b)(Purdon 1989 Supp.). United Services Automobile Association and several of its wholly owned subsidiaries--collectively referred to as "USAA"--contend that this statute violates the dormant Commerce Clause.

2. As both of the lower courts recognized, Pennsylvania's statute serves three purposes: protecting the

ability of insurance regulators to monitor adequately the industry; protecting the industry from undue concentration and lack of competition; and protecting consumers from overt and subtle pressure towards "tie-in" sales of insurance. Pet. App. 30a, 59a.

One of the primary concerns of state insurance regulation is maintaining the solvency of insurance companies. When an insurance company is part of a complex of affiliated entities, however, it is impossible for a regulator to determine its financial condition without the power simultaneously to examine the affairs of all its affiliates. C.A. App. 344a.[1] In the case of an insurance company that is

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[1]The designation "C.A. App." refers to the Appendix filed in the Court of Appeals.

affiliated with a bank, no such examination is possible. Therefore state regulators lack any explicit regulatory mechanism to determine with any confidence the solvency of an insurance company that is affiliated with a bank. C.A. App. 348a-349a.

Secondly, bank-insurance company combinations can adversely effect competition in the insurance industry. Banks and other lending institutions have at their disposal extensive cash reserves which they can use to discourage competition and protect their affiliated insurance operations. C.A. App. 346a. Banks can use these cash reserves to subsidize lower than normal insurance rates in an effort to undersell the competition, thereby gaining a larger market share. C.A. App. 347a. Although

the artifically low insurance rates may reduce competition in the short run, these rates cannot be sustained indefinitely. Such anti-competitive tactics will ultimately produce higher rates in the future since the losses sustained by insurance affiliates will ultimately have to be recaptured. Ibid.

Finally, there is a serious risk that banks with insurance affiliates will use their power to influence borrowers' choices among available insurance companies. Ibid. In the long run, these pressures will undermine the ability of insurance companies not associated with banks to compete with those which are, the result again being increased concentration in the insurance industry and lack of choice for consumers. Ibid.

Against this background is the case of USAA. USAA is licensed to sell insurance in Pennsylvania. In 1983, one of USAA's subsidiaries, having received approval from the appropriate federal agencies, began operating a bank. Pet. App. 46a. The USAA Savings Bank currently does no business in Pennsylvania.

3. After USAA began operating its bank, the Pennsylvania Insurance Department began proceedings to revoke USAA's insurance license. Anticipating this move, USAA sought to forestall it by filing this action against the Insurance Commissioner, challenging Section 641 under the Supremacy Clause, the Commerce Clause, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Pet. App. 46a-47a. Three associations of independent insurance agents--including a multi-state association of agents from

Pennsylvania, Delaware and Maryland--plus three individual agents, intervened in the action. Pet. App. 47a.

The District Court at first dismissed the complaint on abstention grounds, Pet. App. 88a-103a, but the Court of Appeals reversed and remanded for proceedings on the merits, and this Court denied certiorari. Pet App. 67a-87a.

Back in the District Court, USAA moved for summary judgment on its Commerce Clause and Supremacy Clause Claims, Pet. App. 46a, and the District Court granted the motion. The District Court first rejected USAA's claim that Section 641 was preempted by certain federal statutes under the Supremacy Clause. Pet. App. 47a-57a. The District Court held, however, that Section 641 placed burdens on USAA's interstate commerce that exceeded the

statute's local benefits, and that it thus violated the Commerce Clause. Pet. App. 57a-65a. The District Court declared Section 641 to be unconstitutional and enjoined the Commissioner from further action to revoke USAA's insurance license. Pet. App. 65a-66a.

4. The Court of Appeals affirmed the District Court's holding that Section 641 is not preempted by federal law,[2] Pet. App. 25a-28a, and USAA does not pursue that claim in this Court. Pet. at 7. On the Commerce Clause issue, however, the Court of Appeals reversed the District Court and held that the statute does not violate the dormant Commerce Clause.

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[2]The Court of Appeals consolidated this case with another, Ford Motor Co. v. Insurance Commissioner. Pet. App. 4a. In Ford, the Court of Appeals held that Section 641 was preempted, but only to a very limited extent not relevant to the circumstances of USAA. Pet. App. 19a-25a.

In doing so, the Court of Appeals relied heavily on Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978), where the Court upheld against a Commerce Clause attack a Maryland statute which prohibited oil refiners --all of which were from out-of-state-- from operating retail service stations. Pet. App. 321-31, 36a-38a. The Court of Appeals recognized that, as in Exxon, Pennsylvania's statute furthers legitimate state purposes, Pet. App. 30a, and operates in exactly the same way on both in-state and out-of-state entities: "Section 641 places no discriminatory burdens on interstate insurers. It does not add increased costs to them or otherwise distinguish between in-state insurers and out-of-state insurers in the insurance market." Pet. App. 34a.

The Court of Appeals conceded that Section 641 interferes with USAA's chosen strategy for corporate expansion, Pet. App. 36a, but noted that it does the same to Pennsylvania entities, and repeated the Court's admonition in Exxon that "[t]he Commerce Clause [does not] protect[] the particular structure or method of operation in a retail market... the clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulation." Pet App. 38a, quoting Exxon, 437 U.S. at 127 (emphasis added by the Court of Appeals). The Court of Appeals thus concluded that Section 641 does not violate the Commerce Clause.

One issue remained. In the Court of Appeals, USAA had attempted to

raise an issue of state law, namely, that Section 641, properly construed, does not apply to USAA at all. Pet. App. 36a-37a, n. 11. The Court of Appeals had some doubts about whether USAA had in fact preserved this issue, but remanded for the District Court to determine its viability and, if necessary, its merits. Pet. App. 40a.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS AN UNEVENTFUL APPLICATION OF EXXON AND PIKE TO THE FACTS OF THIS CASE.

1. In holding that Pennsylvania's statute does not violate the Commerce Clause, the Court of Appeals simply followed Exxon Corp. v. Governor of Maryland, supra, a case which is on all fours with this one. In Exxon, a Maryland statute prohibited affiliations between oil refiners and services stations; in this case, Pennsylvania prohibits affiliations between banks and insurers. As in Exxon, 437 U.S. at 124-25, Pennsylvania's statute furthers legitimate state purposes, Pet. App. 59a; and as in Exxon, 437 U.S. at 126, Pennsylvania's statute makes no distinction whatever between in-state and out-of-state entities. Pet. App. 32a-34a, 38a.

USAA's attempts to distinguish Exxon are unconvincing and unsupported by the record. USAA claims that Pennsylvania's statute, unlike the Maryland statute in Exxon, is "protectionist...in both intent and effect," Pet. at 18, but as both of the courts below pointed out, "Section 641 treats all insurance companies and all savings and loans alike, whether or not they are based in Pennsylvania." Pet. App. at 34a (quoting District Court's opinion). USAA can point to nothing in the record to the contrary; indeed, the only authority USAA cites, the case of Central Mortgage Co. v. Pennsylvania Insurance Department, 100 Pa. Commonwealth Ct. 233, 514 A.2d 956 (1986), aff'd mem., 517 Pa. 64, 534 A.2d 759 (1987), involved the application of Section 641 to prevent the affiliation

of a Pennsylvania insurer with a Pennsylvania bank. The Court of Appeals thus correctly noted that "[n]othing in the record[]...or in the decision[] of the district court[]... indicates that enforcement of § 641 will have the effect of favoring in-state over out-of-state interests." Pet. App. 38a n.19.

Nor can USAA support its assertion that the operation of Section 641 will increase the business of Pennsylvania insurers at the expense of out-of-state firms. Pet. at 21. The record contains no such evidence, and USAA points to none. In the absence of such evidence, the Court of Appeals correctly followed Exxon, 437 U.S. at 127, in refusing "to assume that USAA's ... share of the insurance products sold in Pennsylvania will not be promptly replaced by other interstate insurers." Pet. App. 37a.

Finally, USAA argues at great length that what it calls the "extra-territorial" effect of Pennsylvania's statute violates the Commerce Clause. Pet. at 16-18. Here again, however, the Court of Appeals simply followed Exxon. Pennsylvania's statute forbids affiliations between insurers and (among others) out-of-state banks; Maryland's statute forbade affiliations between service stations and (among others) out-of-state oil refiners. USAA does not try to explain why Pennsylvania's statute is "extraterritorial" while Maryland's statute was not.

2. USAA also argues that the Court should review this case because, according to USAA, the Court of Appeals has forsaken the balancing test for Commerce Clause cases first articulated

by the Court in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). Pet. at 9-11. USAA is mistaken.

USAA's argument rests upon a mischaracterization of the Court of Appeals' decision. Despite what USAA says, the Court of Appeals expressly acknowledged and applied the Pike balancing test: "§641 must be upheld if the incidental burden that it imposes upon interstate commerce is not 'clearly excessive in relation to its putative local benefits.'" Pet. App. 32a, quoting Pike, 397 U.S. at 142. In its earlier decision in Norfolk Southern Corp. v. Oberly, 822 F.2d 388 (3d Cir. 1987), upon which the Court of Appeals relied and which USAA also attacks, the Court of Appeals had done the same. Id., 822 F.2d at 405-07. USAA's real

quarrel is not with this alleged failure to apply the balancing test, but with the result the Court of Appeals reached when it applied the balancing test to the facts of this case in light of Exxon. This is not the sort of issue that justifies review by the Court.[3]

II. THE INTERLOCUTORY NATURE OF THE DECISION BELOW MILITATES AGAINST REVIEW BY THE COURT.

Although USAA omits this from its petition, the Court of Appeals remanded this case for the District

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[3]This answers also USAA's claim that there is a conflict among the circuits. Pet. at 12-15. The decisions cited-- mainly striking down state anti-takeover laws in the wake of Edgar v. MITE Corp., 457 U.S. 624 (1982)--do not present any doctrinal conflicts with the Third Circuit. Rather, they are routine applications of Pike and other cases-- mainly Edgar--to the facts of each case, just as this decision is a routine application of Pike and Exxon to the facts of this case.

Court to consider USAA's claim that, as a matter of state law, it is not subject to the prohibitions of Section 641. Pet. App. 16a n. 11, 40a. The respondent does not concede that this claim has been properly preserved or that, if preserved, it is meritorious. Nevertheless, the existence of a state-law claim which, if successful, would make it unnecessary for the Court to reach any constitutional issues, makes this case an exceptionally unattractive candidate for the Court's discretionary review.

CONCLUSION

For the foregoing reasons, respondent Foster asks the Court to deny the writ of certiorari.

Respectfully submitted,

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